UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

DIRECTV, INC., d/b/a DIRECTV Home Services¹

and

CASE 20-CA-34858

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340, AFL-CIO

Curtis Mack and T. Warren Jackson, McGuireWoods, LLP, of Atlanta, Georgia, for the Respondent Halima Horton and Brennan W. Bolt (on brief)

Matthew C. Peterson of San Francisco, California, for the General Counsel

Danielle Leonard, Altshuler Berzon, of San Francisco, California, for the Charging Party

DECISION

Mary Miller Cracraft, Administrative Law Judge: This case was tried in Sacramento, California on May 17, 2010,² pursuant to the Amended Complaint and Notice of Hearing issued April 30³ alleging that Respondent, DirecTV, Inc. d/b/a DirecTV Home Services (Respondent) unlawfully enforced its facially lawful no-solicitation, no-distribution rule by discharging quality control technician Timothy Coddington (Coddington) for discussing the International Brotherhood of Electrical Workers, Local 340 (the Union) while on work time in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act).⁴ Respondent timely filed its Answer admitting and denying certain allegations.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions.

¹ Pursuant to General Counsel's post-hearing motion to amend the pleadings (GC Brief fn. 1), no party objecting in response to a Show Cause Order issued July 16, 2010, Respondent's name is corrected from DIRECTV Home Services, Inc. to DIRECTV, Inc. d/b/a DIRECTV Home Services.

² All dates are in 2010 unless otherwise referenced.

³ The original charge was filed by International Brotherhood of Electrical Workers, Local 340, AFL-CIO, on January 19, and amended on April 30. The original Complaint and Notice of Hearing issued March 10.

⁴ 29 U.S.C. § 158(a)(1) and (3) provides, inter alia, that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and to discriminate in order to encourage or discourage membership in a union.

On the entire record, including my observation of the demeanor of the witnesses,⁵ and after considering the briefs of counsel for the General Counsel, Charging Party and Respondent, I make the following findings of fact and conclusions of law.

5 Jurisdiction

Respondent is a California corporation with offices and a place of business in Sacramento, California where it is in the retail business of installing and repairing satellite television equipment and providing satellite television service. During the twelve-month period ending December 31, 2009, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Sacramento, California facility goods valued in excess of \$5,000 which originated from points outside the State of California. Respondent admits and I fine that at all material times it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁶

Labor Organization Status

Respondent admits and I find that the International Brotherhood of Electrical Workers, Local 340, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.⁷

Findings of Fact

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Respondent maintains a facially valid policy regarding solicitation and distribution of literature.

Respondent's solicitation and distribution of literature policy, which all parties agree is facially valid, states, inter alia,

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[Respondent] respects the right of its employees to express and share their beliefs, ideas and opinions among each other. Such communications, however, should never interfere with job responsibilities or disrupt the work environment. Therefore, solicitation by employees on [Respondent's] property is prohibited when any person involved in the solicitation is on working time. Working time is the time employees are expected to be performing their duties; it does not include break or meal periods or time before and after work.

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In addition, distribution of literature by employees on [Respondent's] property in work areas is prohibited at all times. Employees may distribute material only in non-work areas such as, break rooms; cafeterias; elevator areas or kitchens, and only during their non-work time.

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⁵ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherit probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

⁶ 29 U.S.C. §152(2), (6), and (7).

⁷ 29 U.S.C. § 152(5).

Respondent Maintains a Safety and General Liability Progressive Discipline Policy

Pursuant to Respondent's progressive disciplinary policy, certain vehicle safety violations are subject to disciplinary action including verbal warning (informal counseling session), written warning (written document placed in employee file), final written warning – formal counseling (written document placed in employee file), suspension, and termination. Termination is required when the vehicle safety policy mandates termination and when an employee has repeatedly violated or broken a guideline or rule for which only one violation may be tolerated.

Respondent also maintains personal safety progressive discipline policy applicable to such matters as wearing a hard hat, using safety eye protection, wearing work boots, using reflective traffic vests, securing ladders, and placing traffic cones and other traffic control devices while working near a roadway. Pursuant to the personal safety progressive disciplinary policy, failure to place traffic cones, for instance, results in a written warning for the first violation, a suspension for the second, and termination for the third occurrence.

There is no rule which prohibits employees from engaging in social conversation while they are on work time.

As Respondent's rule regarding solicitation and distribution of literature states,
Respondent "respects the right of its employees to express and share their beliefs, ideas and opinions among each other." Human Resources generalist Brannan testified that Respondent requires its employees to be professional and respectful in their communications. No specific written rule was referenced although Brannan thought this might be included under professional conduct – especially when employees were dealing with customers. Brannan testified that there are no rules regarding what employees can talk about with coworkers while on the job.

During work time on August 6, 2009, employee Tim Coddington handed out cards announcing a union meeting. Coddington received a verbal warning for violation of the solicitation and distribution of literature policy by "distributing of Union Materials on company time and company property."

Utilizing his home computer, quality control technician Tim Coddington created a small card which advertised a meeting with the Union to be held on August 7, 2009. The card was approximately two inches by three inches in size and stated the time, date and location of the meeting. The stated purpose of the meeting was to "attempt to organize workers." While checking the odometers of company vehicles, a work assignment, Coddington handed out these cards to other employees.

On August 6, 2009, Coddington was verbally warned⁸ that he was not allowed to distribute the cards during company time or on company property because it was a violation of Respondent's solicitation and distribution of literature policy. Coddington was given a copy of Respondent's policy at the time of the verbal warning. A written note was placed in his personnel file memorializing the verbal warning stating that the reason for the reason for the discipline was "distributing of Union Materials on company time and company property." The legality of this verbal warning is not at issue herein.

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⁸ Pursuant to Respondent's progressive disciplinary policy, a verbal warning and an informal counseling are synonymous terms.

While working outside a customer's home on January 4, 2010, Coddington asked another employee if he had signed a union card and spoke to the employee about the advantages of joining a union.

On January 4, 2010, while on his route, Coddington came upon a DirecTV van parked at the curb of a residence where Coddington was assigned to conduct a quality check. Service technician Dale Winebrinner (not the original installer) had already arrived at this location to fix problems resulting from initial installation, i.e., the installation that Coddington was supposed to evaluate.

Coddington noted that Winebrinner's service van was parked at the curb without the requisite safety cones. Coddington called his supervisor for direction about the missing cones and was told to document the situation. Taking the company-issued camera which he used for documenting quality control inspections, Coddington exited his van, started taking notes, and began photographing the van. Dale Winebrinner approached his van from the customer's house. Coddington asked Winebrinner if he had safety cones in the van. Winebrinner affirmed that he did. Coddington told Winebrinner to put out his cones and Winebrinner did so while Coddington continued photographing the van.

According to Coddington, he concluded his photography at the curb and went into the customer's house. Winebrinner stayed outside to work on the dish. After concluding his interior quality control check, Coddington went outside to the customer's driveway where he encountered Winebrinner. Coddington asked Winebrinner if he had signed a union card. Winebrinner did not respond so Coddington asked again if he had signed a union card. Winebrinner said that he had not and asked what the benefits of signing would be. Coddington said that a union might be able to help Winebrinner in situations such as this, and gestured toward the van. Neither Coddington nor Winebrinner testified that Coddington gave Winebrinner a union authorization card at any time during the conversation. After the brief exchange, Winebrinner said that he thought they were not supposed to be talking about the Union. Coddington agreed. All conversation about the Union ceased and both employees carried on with their work. After training the customer on how to work the DirecTV system, Coddington left the location and continued his route.

According to Winebrinner, he came out of the customer's house and Coddington approached him asking if he had safety cones. Winebrinner responded affirmatively. Coddington then asked Winebrinner if he had signed a union card yet. Winebrinner said he had not. Coddington began taking pictures of the van and of Winebrinner putting the cones out. Coddington said "he wasn't sure what kind of trouble I was going to get into for not having my safety cones out and that if I had union representation that I would probably be in a better situation " According to Winebrinner, Coddington then took some more pictures and then, according to Winebrinner, repeated the same statement: he didn't know what kind of trouble I was going to get into, but some disciplinary action was probably going to happen because I didn't have my safety cones out" Finally, in response to the question, "And did he say, do you recall his saying anything about whether your employment would continue?" Winebrinner responded, "Well, he did say that he, you know, knew that this could be up to a terminating disciplinary action but if I had a union representation, it probably wouldn't be as harsh." Then according to Winebrinner, Coddington again said that Winebrinner would probably be better off if he had a union representative to help him "in this kind of situation." Winebrinner responded that employees were not supposed to discuss the union on company time and Coddington agreed.

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The log of pictures taken by Coddington indicates that four pictures were taken at the curb over, at most, a two-minute period. Two were taken of the van. Two others showed the van and Winebrinner.

After leaving the jobsite, Winebrinner called his supervisor Erick Lutz and reported that he felt that Coddington was trying to coerce him into signing a union card. Winebrinner testified that he told Lutz that whenever he said he had not made up his mind about signing a card, Coddington took more pictures. Lutz told Winebrinner that he should talk to operations manager Varnell the following day. Ultimately, Winebrinner was informally counseled about putting out safety cones and he was given a verbal warning for failure to comply with the safety policy. As mentioned above, the personal safety progressive discipline policy mandates a written warning for the first failure to use traffic cones.

On January 5, Coddington was suspended pending investigation. The behavior cited for the suspension was that Coddington "spoke about the advantages of joining a union to a service technician while working at a customer's home."

At 2 p.m. on January 5, Coddington's supervisor, Sean Brown, called him and told him to report back to the facility. When Coddington arrived, he was escorted to the conference room by Brown. Operations Manager Varnell and Human Resources generalist Brannan were waiting. During the meeting, Varnell explained that Coddington had been reported for talking about the Union during working hours. Coddington admitted that he had asked another employee if he had signed a union card. Varnell discussed the solicitation and distribution of literature policy and told Coddington that he was being placed on a non-disciplinary suspension while Respondent investigated the incident.

Respondent investigated the incident from January 5 through January 13

Prefatory to discussing the investigation, it is important to note that the investigatory reports and statements were admitted not to prove the truth of the matters asserted in the documents but rather to show that certain statements were made. Moreover, some of the statements include subjective feelings regarding the events. Such subjective characterizations do not constitute a basis for my findings.

Brannan interviewed Winebrinner on January 5. Her written report indicates that after Coddington asked Winebrinner whether he had any safety cones, Coddington then asked Winebrinner if he had signed a union card. Winebrinner replied no. Then, according to Brannan's report, Coddington told Winebrinner that in a situation like this, a union might be a benefit. Brannan's report continues that Winebrinner stated that he felt "that by how Tim phrased his words that if he signed a Union card, the issue of the safety cones would disappear."

Brannan and Varnell interviewed Coddington thereafter. Coddington agreed that he had asked Winebrinner whether he had signed a union card.

Respondent's investigation included a statement from Winebrinner as follows:

I, Dale Winebrinner, while on a service call, was returning from a customer's house to my work van and was approached by our QC technician Tim Coddington and asked if I had safety cones on my vehicle. I replied yes and started to place my cones out, at which time the QC tech asked me if I had signed my union card yet, I told him no. The QC tech then said that would be one

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of the benefits of having a union negotiator to speak on my behalf in a situation like this because he didn't know what kind of trouble would come down on me for not having placed my cones out upon arrival. He then took pictures of my van while I proceeded to go to work. After he took pictures he then again approached me and said that having a union rep could help me in a situation like this. I then told him he was not supposed to be talking about the union on company time.

Coddington gave the following statement as part of the investigation:

The stress of having found a tech (for the first time) without his cones properly protecting his van put me in a state where I was very upset about the possibility of this tech being terminated for what seems like a minor mistake. It is my understanding that after having been found in such a position once, then if he is found again, it is an automatic termination. I asked the tech if he had filled out a union card to request union representation. He replied by saying no, sounding as if he was upset by the question, and by asking me what the advantage would be. I told him it might be protection against "things like this," and that ended any union conversation.

Respondent questioned five other employees asking them, "Has QC Tech, Timothy Coddington spoken to you about an unusual topic while at work or a topic that shouldn't be talked about during work hours?" All five employees responded without mentioning any union-related work time conversation with Coddington.

Thus, Respondent's investigation revealed that Coddington spoke to one employee about the benefits of a union while on working time. There is absolutely no evidence that Respondent's investigation uncovered any evidence that Coddington did anything other than talk with Winebrinner. Coddington and Winebrinner continued working throughout the conversation. The investigation did not reveal that Coddington proffered a union card or any other document to Winebrinner for signature. Thus, in this respect, Respondent's investigation and the testimony before me is identical in indicating that no union authorization or other written materials were involved in the conversation between Coddington and Winebrinner.

Brannan testified that after conducting the investigation, she and Varnell concluded that the incident had been "fairly egregious" and therefore she presented the report to, Nocita⁹, director of human resources, and consulted legal counsel. Brannan testified that, generally with terminations, human resources provides advice, but management ultimately decides whether to terminate an employee. After consulting Brannan's report and speaking with Brannan and Varnell, Nocita made the decision to terminate Coddington.¹⁰ In making this decision, Brannan testified that she, Varnell and Nocita considered the events that were reported on January 4 as well as Coddington's violation of the solicitation and distribution of literature policy in August 2009.

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⁹ The record does not reference Mr. Nocita's first name.

¹⁰ Varnell testified that he made the recommendation to terminate Coddington approximately four to five days after Winebrinner submitted his written report.

On January 14, Coddington was discharged for violating the solicitation and distribution of literature policy on two occasions within 4 months.

On January 14, Brown and Coddington met with Varnell and Brannan in the conference room. Varnell said that there had been an investigation as to whether Coddington had been soliciting on company time. Varnell asserted that the investigation showed that Coddington had been soliciting on company time and because Coddington had been warned on August 6, 2009, for distributing leaflets, he was being terminated. Coddington asked if he was being terminated just because of the question he asked Winebrinner. Varnell told Coddington that it was because of the question and the surrounding circumstances. The Employee Consultation Form states:

Within the last 4 months, on two separate occasions, Mr. Coddington engaged in misconduct in violation of the company's no-solicitation/distribution policy by distributing literature in working areas (August 6, 2009) and soliciting during working time (January 4, 2010). The decision has been made that based on Mr. Coddington's repeated violation, despite receiving corrective counseling in August, 2009, will result in his termination effective January 14, 2010.

Coddington was presented with and refused to sign a separation notice. Coddington was then escorted off the premises.

Credibility Resolution

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As between Coddington and Winebrinner's testimony, I credit Coddington. Not only was Coddington direct and straight forward while testifying, he also rendered a plausible account of the events with genuine spontaneity. Moreover, the log of pictures taken by Coddington indicates that the four pictures of Winebrinner and his van were taken in at most 2 minutes. This tends to support Coddington's recollection that he took the pictures and afterwards had a conversation. On the other hand, Winebrinner's testimony was rigid and appeared rehearsed. Moreover, it is implausible that in such a vacuum of other conversation, a statement would be repeated as often as Winebrinner testified. It also appears unlikely that such a limited amount of conversation could have taken 15 minutes, as Winebrinner testified it did. Further, I note that Winebrinner never stated at any time during the investigation that Coddington mentioned discharge. When prompted at the hearing, Winebrinner testified that Coddington mentioned that failure to place safety cones was up to a dischargeable offense. Thus, I find that Coddington told Winebrinner that a union might save him from "this," meaning getting in trouble for failure to use safety cones. I find that Coddington did not tell Winebrinner that discharge was possible.

Conclusions of Law

By Enforcing its Solicitation and Distribution of Literature Policy to Prohibit Work Time

Discussion of the Union, Respondent has engaged in unfair labor practices affecting commerce
within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Although Respondent's solicitation and distribution of literature policy is facially valid, I find that it was unlawfully enforced regarding the Coddington/Winebrinner conversation on January 4 to preclude employee discussion of the Union during work time. The record reflects that Coddington merely asked Winebrinner if he had signed an authorization card.

A no-solicitation rule is not violated when an employee merely asks a coworker if he has signed a union authorization card. In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enfd.* 400 F.3d 1093 (8th Cir. 2005), the Board stated:

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Once again, our analysis turns on the distinction between union solicitation and other employee activity in support of organizing. "'[S]olicitation' for a union is not the same thing as *talking about a union or a union meeting* or whether a union is good or bad." [footnote citing *W. W. Grainger*, 229 NLRB 161, 166 (emphasis added)]. In recognition of this distinction, the Board found that an employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card. [footnote citing *Lamar Industrial Plastics*, 281 NLRB 511, 513 (1986)].

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There is absolutely no evidence that Coddington gave Winebrinner a union authorization card or any other document during their conversation on January 4. In fact, Coddington's uncontroverted testimony is that he did not have any authorization cards at the time. Further, there is no evidence that Coddington's actions required an immediate response from Winebrinner. Accordingly, I find that Coddington's question was not solicitation and therefore did not violate Respondent's facially valid no-solicitation policy.

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Moreover, I note that an employer may not ban discussions about a union or other protected, concerted activities during work time when it allows employees to engage in general non-work conversation during work time. See, e.g., *M. J. Mechanical Services*, 324 NLRB 812, 814-15 (1997), enfd. mem. 772 F.3d 920 (DC Cir. 1998) (citing *Willamette Industries*, 306 NLRB 1010 fn. 2, 1017 (1992)).

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By Discharging Quality Control Technician Timothy Coddington, Respondent violated Section 8(1) and (3) of the Act.

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Based upon the record as a whole, I conclude that Respondent unlawfully terminated quality control technician Coddington in violation of Section 8(a)(1) and (3) of the Act for "soliciting during working time." The evidence establishes that by "soliciting" Respondent refers to Coddington's conversation with Winebrinner. Nothing more than conversation occurred. There is no evidence that either Coddington's or Winebrinner's production was affected. There is no evidence that employees were not allowed to engage in social discourse while on work time. Thus, Coddington was discharged for engaging in the protected activity of talking with a coworker about the Union while on work time.

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In NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964),11 the Court held

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In sum, §8(a)(1) is violated if it is shown that the discharged employee at the time was engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, quilty of that misconduct.

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¹¹ The traditional discharge framework set forth in *Wright Line, Wright Line Div.,* 251 NLRB 1083 (1980), *enfd. on other grounds* 662 F.2d 889 (lst Cir. 1988), *cert. denied,* 455 U.S. 989 (1982), *affirmed in NLRB v. transportation Management Corp.,* 462 U.S. 393 (1983), is not applicable herein because Coddington was discharged for conduct which occurred at a time when he was engaged in the protected activity of discussing the union with a coworker. See, e.g., *White Electrical Construction Co.,* 345 NLRB 1095, 1096 (2005).

Applying the *Burnup & Sims* framework to the facts of this case, I find that Coddington was discharged for talking with Winebrinner about the Union. I find that Respondent knew that Coddington was talking about the Union as evidenced by its language utilized in suspending and discharging Coddington. As I have found no other misconduct was involved in the conversation, Coddington was not guilty of any misconduct. Thus, his discharge violated Section 8(a)(1) and (3) of the Act.

Citing Chicago Metallic Corp., 273 NLRB 1677 (1985), enfd. 794 F.2d 527 (9th Cir. 1986) and Classe Ribbon Co., 227 NLRB 406, 410 (1976), Respondent argues that Coddington was guilty of misconduct because he threatened Winebrinner with loss of employment. In Classe Ribbon Co., supra, the Board affirmed the judge's finding that an employee who threatened employees that they would be discharged if they failed to sign a union card, was guilty of misconduct. Id., 227 NLRB at 410. Thus the Board affirmed the judge's conclusion that the discharge of the employee was not a violation of the Act.

In *Chicago Metallic Corp., supra,* the administrative law judge found that an employee who, in the course of discussing the union, made unambiguous threats of violence and statements that job loss would result from failure to support the union was guilty of misconduct. *Id.* 273 NLRB at 1702. Thus, under the judge's *Burnup & Sims* analysis, the employer did not violate the Act in discharging the employee. *Id.* 273 NLRB at 1703.¹²

The record reflects that Respondent had absolutely no evidence of any threat of discharge at the time it made its decision to terminate Coddington. The record reflects that discharge was first introduced at the hearing in this matter and I have discredited that testimony. Moreover, the record indicates that Respondent's investigation showed no threat of discharge and a threat of discharge was not mentioned in terminating Coddington. Respondent's investigatory statement given by Winebrinner states that Coddington statement said he didn't know what kind of trouble Winebrinner would get into for not placing safety cones by his van (Winebrinner's statement to Respondent). Respondent also had a report from Brannan after she interviewed Winebrinner stating, "Mr. Coddington then said that in a situation like this a union may be a benefit." Finally, the discharge consultation form states in relevant part, "... Timothy Coddington spoke about the advantages of joining a union to a service technician while working at a customer's home." No threat of discharge is mentioned. Thus, I find that the alleged threat of discharge is pretextual.

Moreover, were I to credit Winebrinner's statement that Coddington mentioned that "this could be up to a terminating disciplinary action" in connection with urging Winebrinner to support the union, my conclusion would not be altered. The discussion of Administrative Law Judge William J. Pannier III in *Twilight Haven, Inc.*, 235 NLRB 1337, 1342 (1978), is relevant:

Misconduct, however, will not be found readily, for both the Board and the courts have granted considerable latitude to employees for argument and counterargument in preelection situations, recognizing the "strong emotions" generated by union activity. *Id. [NLRB v. Burnup & Sims, Inc.,* 379 U. S. 21 (1964)] at 23. Thus, failure to exercise "finesse and gentility" in campaigning for or against representation will not serve to divest employees of their statutory

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¹² I note that no exceptions were taken to the judge's finding. It is well settled that the Board's adoption of a portion of a decision to which no exceptions are filed, does not constitute precedent for any other case. See, e.g., *ESI*, *Inc.*, 296 NLRB 1319 fn. 3 (1989).

protection. *Cement Transport, Inc.,* 200 NLRB 841, 845-846 (1972), enfd. 490 F.2d 1024 (C.A. 6, 1974); see also *NLRB v. Efco Manufacturing, Inc.,* 227 F.2d 675, 676 (C.A. 1 1955). "Meaningful protection in this situation must require that relatively minor incidents of misconduct, such as name-calling or somewhat ambiguous or veiled threats, do not remove the Act's protection from the perpetrator, or suffice to legitimize his discharge." *Corriveau & Routhier Cement Block, Inc.,* 171 NLRB 787, 788 (1968), enforcement denied in circumstances presented 410 F.2d 347 (C.A. 1 1969). (footnote omitted).

The statement that failure to place safety cones could be up to a terminating disciplinary action was true according to Respondent's rules. Moreover, the statement falls far short of an explicit threat of discharge. It is an ambiguous statement at best and does not warrant loss of the Act's protection. Thus, were Winebrinner's testimony in this regard credited, I would nevertheless find that the statement did not constitute misconduct.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily enforced its solicitation and distribution of literature rule to prohibit work time discussion among its employees of union or other protected, concerted activities while allowing all other nonwork-related discussion, Respondent must cease maintaining and giving effect to the rule in this manner. The General Counsel argues that Respondent's solicitation and distribution of literature rule must be rescinded due to unlawful enforcement of the rule to discharge Coddington, relying on *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (maintenance of a rule which does not specifically restrict Section 7 activity may nevertheless constitute a violation if it is enforced to restrict Section 7 rights). However, the rules discussed in that case are open to interpretation and do not include a facially valid no-solicitation rule. In this case, a more meaningful remedy for unlawful enforcement of this facially valid rule is the Notice.¹³

Having discharged its quality control technician Timothy Coddington based upon its discriminatory enforcement of its solicitation and distribution of literature policy and because of his support for the Union, Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, Respondent must remove all documents from Coddington's personnel file regarding his discharge and investigation of his discharge and inform him in writing that these documents have been removed and will not be used as a basis for further personnel actions against him in the future.

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¹³ I note that in *Wal-Mart Stores, supra,* the Board did not require that a facially valid nosolicitation be rescinded even though it was unlawfully applied to prohibit an off-duty employee from entering the selling floor wearing a union T-shirt.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

Respondent DIRECTV, Inc., d/b/a DIRECTV Home Services, its officers, agents, successors, and assigns,

- 1. Shall cease and desist from
 - (a) Interpreting and maintaining its solicitation and distribution of literature policy to preclude work time discussion of International Brotherhood of Electrical Workers, Local 340, AFL-CIO, or any other union or of any other protected, concerted activity;
 - (b) Discharging or otherwise discriminating against any employee for work time discussion of a union or of protected, concerted activity or for supporting International Brotherhood of Electrical Workers, Local 340, AFL-CIO, or any other union.
 - (c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of the Board's Order offer Coddington full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent shall also make Coddington whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of this decision.
 - (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Timothy Coddington and within 3 days thereafter notify Coddington in writing that this has been done and that the discharge will not be used against him in any way.
 - (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records and reports, and all other records, including payroll records,

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 ¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and
 45 Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under this Order.

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(d) Within 14 days after service by the Region, post at its facility in Sacramento, California, copies of the attached notice marked "Appendix." Copes of the Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14,

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 5, 2010

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Mary Miller Cracraft
Administrative Law Judge

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¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT maintain or discriminatorily enforce our solicitation and distribution of literature policy to prohibit discussion of the International Brotherhood of Electrical Workers, Local 340, AFL-CIO, or any other union.

WE WILL NOT discharge you or otherwise discriminate against you because you discuss the International Brotherhood of Electrical Workers, Local 340, AFL-CIO, or any other union or because you support the International Brotherhood of Electrical Workers, Local 340, AFL-CIO, or any other union.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Timothy Coddington, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL offer Timothy Coddington full reinstatement to his former job or, if that job not longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Timothy Coddington whole for any loss of earnings and other benefits suffered as a result of his discharge, less any interim earnings, plus interest.

DIREC		DIRECTV, Inc. d/b/a DIRECTV	RECTV, Inc. d/b/a DIRECTV HOME SERVICES	
	_	(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's

Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400 San Francisco, California 94103-1735 Hours: 8:30 a.m. to 5 p.m. 415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE COMPLIANCE OFFICER, 415-356-5139.